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No. 00-946

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

S.S., BY AND THROUGH HER NEXT FRIEND AND GUARDIAN AD LITEM, ELLEN D. JERVIS,

PETITIONER,

v.

MICHELLE MCMULLEN, SHERRY JACOBY, AND KATHLEEN BARNETT,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF *AMICUS CURIAE* CHILDREN'S LAW CENTER OF MINNESOTA IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF THE ARGUMENT

Amicus Curiae Children's Law Center of Minnesota ("CLC") is a non-profit organization whose mission is to promote the rights and interests of all children in the judicial, child welfare, health care and education systems.[1] As set forth in the accompanying written consent forms, counsel for both Petitioner and Respondent have consented to the submission of this amicus brief. CLC carries out its mission in two ways: (1) by providing direct representation for children in the foster care system; and (2) by advocating for and participating in state and national efforts to reform and improve the child protection and juvenile justice systems.

Children have rights and legal protections, but they are not self-supporting. They need someone, first, to help them understand how their lives can be better and, second, to speak effectively on their behalf and promote their important interests. The services that CLC provides center on the rights of children to have a voice in their own future and to be secure in their person and environment.

CLC supports the Petition for Writ of Certiorari filed by Petitioner S.S., by and through her Guardian Ad Litem Ellen D. Jervis. CLC submits this brief because of the critical issues at stake for the safety of all children committed to the custody of the state. All states have designed child protection systems to receive and process reports of abuse and neglect of children, taking into custody those children who have been injured and are in danger of re-injury. All states mandate that

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[1] This brief was written entirely by counsel for amicus, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

individuals in certain professions—doctors, nurses, social workers, teachers, psychologists, and child care workers, among others—report cases of suspected and actual abuse and neglect of children. While the child protection system is not a perfect system, the community has a reasonable expectation that the system will accept reports and respond appropriately to protect children about whom reports are made. A system that ignores, does not investigate, or pays little attention to such reports discourages citizens from continuing to report suspected and actual abuse. Such a situation was described recently in the 1998 Minnesota Legislative Auditor's Report on the child protection system.

Rather than encouraging the protection of vulnerable children, the decision of the Eighth Circuit Court of Appeals in S.S.'s case countenances the return of children to abusive family situations, in derogation of existing federal and state statutory schemes designed to prevent precisely that outcome. For example, since at least 1995, Missouri's child protection system's primary purpose has been to keep children safe, and only secondarily to reunite families when it is safe to do so. *See* Mo. Rev. Stat. § 211.011 (1995). The passage of the federal Adoption and Safe Families Act of 1997, 42 U.S.C. § 671, reaffirms the primary importance of children's safety.

Accepting review of this case will enable the Court to articulate what conscience-shocking acts must be alleged to give rise to a substantive due process claim on behalf of a child in state custody. In most states, the child protection system is closed to public view. Only after a brutal murder or assault of a child in an abusive family situation do the citizens of a state get a glimpse of what occurs behind the iron curtain of confidentiality maintained around state child protection systems. Only then can a community begin an informed debate of what the standards for its child protection system should be.

The dismissal of this case on the pleadings, for failure to state a claim, deprived the plaintiff of the opportunity to discover additional facts that "shock the conscience." For example, would it have made a difference to the outcome if it were known that the child's father was a man married to her mother, but was not her biological father? Or that he did not ask for custody, but that custody was thrust upon him by the county?

S.S. is a young girl who, at the age of 3, was taken into custody by the Missouri Division of Family Services in order to remove her from an abusive family situation. S.S. remained in the state's custody for 2½ years. The Division then decided to return S.S. to the custody of her father, despite having learned in the meantime that S.S.'s father associated with a convicted pedophile and had allowed the pedophile to interact with S.S. while S.S. was in the State's custody. Within three months after the State returned custody to S.S.'s father, the pedophile sexually abused S.S. The abuse traumatized S.S., requiring her to be hospitalized for a week and subsequently institutionalized at a psychiatric facility.

No one reviewing the horrific abuse to which this small child was subjected can fail to be moved and to wonder how a state system, ostensibly designed for her protection, could have exposed her to such harm. Legally, the question presented by S.S.'s Petition is whether the actions taken by the Missouri Division of Family Services employees responsible for S.S. rise to the level of a substantive due process violation actionable under 42 U.S.C. § 1983 and the Fourteenth Amendment. The difficulty of this legal question is apparent from the closely divided opinions of the courts that have so far considered this case. The District Court dismissed S.S.'s complaint, relying upon *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

On appeal, the Eighth Circuit Court of Appeals, in a panel opinion, reversed the District Court, holding that *DeShaney* did not bar S.S.'s claims, because here instead of failing to protect a child who was not in state custody, the state affirmatively endangered a child who was in its custody. *See S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066, 1069-70 (CA8 1999). Subsequently, the Eighth Circuit granted rehearing *en banc* and reversed the panel decision, holding that *DeShaney* did bar S.S.'s claims. *See S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960 (CA8 2000).

CLC believes that denying to children such as S.S. any possibility of stating a constitutional claim represents a denial of substantive due process, as recognized by *DeShaney* and prior Supreme Court precedents. The issues presented by S.S.'s Petition are critical to the hundreds of thousands of children who are taken into State custody each year, in determining the extent of their constitutional rights to be safe and protected while in state custody. In addition to the importance of the constitutional issues presented by this case, the existing split among the Circuit Courts of Appeal warrants accepting S.S.'s Petition to resolve whether a child whom the state affirmatively decides to place with an abusive parent, foster parent, or relative may raise a substantive due process claim for resulting harm.

ARGUMENT

I. CHILDREN WHO FIND THEMSELVES IN STATE CUSTODY ARE ENTITLED TO DUE PROCESS RIGHTS EQUIVALENT TO PRISONERS, PRETRIAL DETAINEES, OR MENTAL PATIENTS.

The adage – our children are our future – though often repeated, is true. As a society, we strive to nurture, educate, and protect our children.

For centuries, our legal system has played a vital role in protecting children. Among other things, the Magna Carta addressed the grievances of the Barons against King John for his abuse of the rights of children who were wards of the state. *See Eugene D. By and Through Olivia v. Karman*, 889 F.2d 701, 712 (CA6 1989) (Merritt, Chief Judge, dissenting), *cert. denied*, 496 U.S. 931 (1990). In more recent times, federal and state governments alike have recognized that in matters relating to the custody or placement of a child, the best interests of the child are paramount. *See e.g.*, CAPTA, 42 U.S.C. § 5101 *et seq.*; AACWA, 42 U.S.C. §§ 620-627, 670-679)(a); Mo. Rev. Stat. § 211.011 (1995); Minn. Stat. § 257.025 (1998); N. D. Century Code § 14-09-06.1. A child's safety takes precedence over reuniting a family, as recognized by such recent legislation.

The importance of children to our society and the protections that the Constitution provides for children have not been lost on the Court, which once stated: "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent . . . citizens." *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 165 (1944) (enforcement of child labor laws to protect children does not infringe religious freedom). In

Prince, the Court further explained: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Id.* at 168.

On a number of occasions, a concern for the safety and well-being of children has influenced the Court's interpretation of the Constitution. For example, although the Court has zealously protected the First Amendment right to free speech, the Court has recognized that the interests of children may provide a basis for a state to restrict those fundamental rights. *See F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

Similarly, the Court's approach to the Equal Protection Clause as it applies to public education has been heavily influenced by the importance of the education of children. In *Brown v. Bd. of Education*, 347 U.S. 483 (1954), the Court described the critical nature of the state's undertaking to educate children as follows:

> In these days, it is doubtless that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493; *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance"); *Plyler v. Doe*, 457 U.S. 202 (1982) ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute

in even the smallest way to the progress of our Nation"). The Court has recognized, and should continue to recognize, the special place that children have in our society as it interprets the Constitution.

On a number of occasions, the Court has reasoned by analogy to determine whether the Constitution provides substantive due process protection for specific classes of people. For instance, in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), this Court held that the Eighth Amendment protects prisoners from the deliberate indifference of prison officials to prisoners' medical needs. Then, reasoning by analogy, the Court in *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982), addressed a state's treatment of the involuntarily committed, and held: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed – who may not be punished at all – in unsafe conditions." Extending the analogy further, a year later the Court held that the due process rights of a pretrial detainee are at least as great as the protections afforded convicted prisoners. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

There can be no doubt where children fall on this continuum of prisoners, the mentally impaired, and pre-trial detainees. If convicted criminals, pre-trial detainees, and the involuntarily committed all have the constitutional right to have their basic human needs met while in state custody, including reasonable protections of their safety, surely a helpless child rescued by the State from an abusive situation and taken into the State's permanent custody, deserves equal constitutional protection of her safety.

Both the Eighth Circuit's panel decision and its subsequent *en banc* decision acknowledged the Court's

instruction that, in order to infringe substantive due process rights, the alleged state action must "shock the conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Likewise, both Eighth Circuit decisions recognized that the abuse suffered by S.S. was horrendous enough to shock anyone's conscience. However, the *en banc* opinion drew an artificial line between the actions of the state in placing S.S. in the path of an abuser and the resulting abuse itself, in order to conclude that while the latter was shocking, the former was not. No such artificial distinction should be made.

If the State of Missouri, instead of placing S.S. in a home where it expected and anticipated that she would have regular contact with a convicted pedophile, had placed S.S. in the path of an oncoming train, the artificiality of the distinction between the act of placing the child in danger and the harm resulting to the child would be apparent. The state action endangering S.S. is no less shocking than the state actions deemed actionable in *Estelle*, *Youngberg*, and *City of Revere*.

II. *DESHANEY* RECOGNIZED TWO CATEGORIES OF PERMITTED SUBSTANTIVE DUE PROCESS CLAIMS, AND BOTH APPLY HERE.

DeShaney recognized the continuing validity of prior cases holding that substantive due process claims may be raised in certain circumstances, including *Estelle*, *Youngberg*, and *City of Revere*, among others. *DeShaney* categorized cases in which proper substantive due process claims might be brought into two groups: (1) cases where the state has taken a person into its custody and thereby becomes subject to a constitutionally imposed duty of responsibility for the person's safety and general well-being, and (2) cases where the state has created the danger faced by the person or acted

in such a way so as to render the person more vulnerable to danger. 489 U.S. at 198-99.

This case fits within both *DeShaney* exceptions. S.S. was taken into the State's custody, and the State affirmatively placed S.S. in danger and rendered her more vulnerable to that danger by placing her in the path of a known pedophile. To recognize that S.S.'s claims fit within one or both of the long-established substantive due process categories of claims that pre-existed and were reaffirmed by *DeShaney* would not open the floodgates to a series of new and different substantive due process claims. On the other hand, to permit the Eighth Circuit *en banc* opinion to stand may have the chilling effect of cutting off claims even in circumstances that *DeShaney* explicitly recognized as giving rise to proper constitutional claims.

A. The Division's affirmative actions with respect to S.S. meet the criteria for the "state-created danger" exception to *DeShaney*.

Applying *DeShaney*'s "state-created danger" exception, 498 U.S. at 201, a number of circuits have found liability for state action in circumstances similar to S.S.'s.

In *Kneipp v. Tedder*, 95 F.3d 1199 (CA3 1996), the Third Circuit articulated a four-part test for applying the "state-created danger" exception: (1) the harm ultimately caused must be foreseeable and fairly direct; (2) the state actor must act in willful disregard for the safety of the plaintiff; (3) there must exist some relationship between the state and the plaintiff; (4) the state actors must have used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. 95 F.3d at 1208. Applying that test, the Third Circuit held that plaintiff stated a constitutional claim by alleging that a police

officer created a danger that she would be injured. The police officer stopped plaintiff and her husband on their way home, knew that she was severely intoxicated and that her husband was helping her get home, allowed her husband to continue home to relieve the babysitter, but detained and then later released plaintiff to continue home unaccompanied by her husband or other helper. *Id.* at 1201-03. Because she was extremely intoxicated and unassisted, Ms. Kneipp did not reach home but instead fell down an embankment, suffering permanent, debilitating injuries. *Id.* at 1203.

More recently, the Third Circuit affirmed a finding that the "state-created danger" exception applied where the state failed to investigate a father's background or to report to the Children and Youth Services agency the existence of an outstanding Protection from Abuse Order against the father that would have disqualified him from being the child's custodian. The state nevertheless returned the child to the father's custody. The child subsequently was beaten to death. *See Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995), *aff'd without opinion*, 116 F.3d 467 (CA3 1997). The district court stated, "the fact that a child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations." *Id.* at 233. In distinguishing the facts of *DeShaney*, the court emphasized: "It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the court after a CYS investigation and recommendation." *Id.*

The Seventh Circuit also has applied the "state-created danger" exception to children abandoned by state actors who were aware of specific dangers likely to confront the children, even though the state actors did not create the dangers themselves but rather rendered the children more

vulnerable to pre-existing dangers. *See White v. Rochford*, 592 F.2d 381 (CA7 1979).[2] In *White*, the court held that the State may be liable for harm caused to children after police officers arrested the children's uncle for drag racing and then abandoned the children on a freeway where they were subjected to the dangers of inclement weather and traffic. *Id.* The Seventh Circuit explained that under the Due Process Clause's restraint against "undue incursions on personal security" it was sufficient to state a claim by alleging that "the defendants left helpless minor children subject to inclement weather and great physical danger without any apparent justification." *Id.* at 383-84.

On the heels of *DeShaney*, the Ninth Circuit held that the State could be held liable for creating the danger of rape when a police officer left a passenger by the side of the road in a dangerous part of town. *See Wood v. Ostrander*, 879 F.2d 583 (CA9 1989). As the Ninth Circuit explained, "the fact that [the officer] arrested [the driver], impounded his car, and apparently stranded [the passenger] in a high-crime area at 2:30 a.m. distinguishes [the passenger] from the general public and triggers a duty of the police to afford her some measure of peace and safety." *Id.* at 590.

The Ninth Circuit again applied the "state-created danger" exception where a registered nurse was raped by an inmate assigned to work with her in a juvenile custodial facility's health clinic. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (CA9 1992), *cert. denied*, 508 U.S. 951 (1993). In distinguishing the "state-created danger" exception from *DeShaney*'s more generally recognized and applied

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[2] *White* was decided before *DeShaney*, but has continuing validity under the "state-created danger" exception. *White* was not addressed by the *DeShaney* majority though it was referenced by the dissent.

"custodial" exception,[3] the court explained: "The 'danger creation' basis for a claim . . . necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." *Id.* Thus, the *Grubbs* court found that the plaintiff nurse stated a claim for violation of Due Process rights where she alleged that:

> the Defendants knowingly assigned Blehm [the inmate] to work with L.W. despite their knowledge that: (1) Blehm was not qualified to serve as cart boy; (2) Blehm had an extraordinary history of unrepentant violence against women and girls; (3) Blehm was likely to assault a female if left alone with her; (4) L.W. would be alone with Blehm during her rounds; and (5) L.W. would not be prepared to defend against or take steps to avert an attack because she had not been informed at hiring that she would be left alone with violent offenders.

Id. at 121. The court explained that, "the Defendants, like the officer in *Wood*, thus used their authority as state correctional officers to create an opportunity for Blehm to assault L.W. that would not otherwise have existed." *Id.*

In stark contrast to the above decisions, the Eighth Circuit's *en banc* decision in this case declined to recognize the State's knowing placement of S.S. in the path of a known pedophile as a "state-created danger" rendering S.S. more vulnerable to the known danger presented by Griffis. Like the child in *Ford*, S.S. had previously been in foster care for a period of two and one half years where she faced little danger

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[3] *See* section II.B. below.

from Griffis. Like the children in *White*, the abandoned passenger in *Wood* and the nurse in *Grubbs*, the danger facing S.S. when the state returned her to her father's custody (i.e., sexual abuse by Griffis) was not "created" by the defendants. Rather, the state's affirmative action of placing S.S. back into her father's care despite knowledge that Griffis, a convicted pedophile, associated with S.S.'s father and occasionally lived in his home, rendered S.S. more vulnerable to known dangers by creating an opportunity for Griffis to harm S.S. that did not exist while S.S. remained in state custody and foster care with supervised visitation. Thus, had S.S.'s case arisen in the Third, Seventh or Ninth Circuits, and perhaps others,[4] S.S.'s claims likely would not have been dismissed.

The Eighth Circuit reversed and dismissed by analogizing S.S.'s case to *DeShaney*. The *en banc* opinion reasoned that the danger faced by S.S. when the state returned to her father's custody was not increased or different from that which she faced before she was removed, because the State "merely placed her back into the situation from which it had originally retrieved her." *S.S.*, 225 F.3d at 962. This analysis is flawed in two ways.

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[4] *See, e.g., Dewares v. City of New York*, 985 F.2d 94 (CA2 1993). In *Dewares*, the Second Circuit found that the plaintiff stated a claim for violation of his Due Process rights where he alleged that police informed "skinheads" at a flag burning demonstration that they would not interfere with the skinheads' assault of demonstrators unless they got "totally out of control." *Id.* at 99. The court found that the State action increased the likelihood that the skinheads would assault demonstrators and made the demonstrators more vulnerable to assault and that the police were in effect complicit in the violence. *Id.* Arguably, defendants' return of S.S. to her father's custody in the face of what they knew about Griffis's past and his exposure to S.S. with the "understanding that if anything happened to S.S. it would be her father's fault" was tantamount to the complicity exhibited by the officers in *Dewares*.

First, the conclusion that S.S. faced the same danger after she was returned to her father's custody as that she faced before she was removed several years earlier is without foundation in the record. The record does not support the conclusion that S.S. was exposed specifically to Griffis and faced possible sexual abuse by him before she was first removed from her father's custody. *See id.*, at p. 965 (stating that S.S. had been removed from her father's custody in 1994 because "S.S.'s father had allegedly smeared human feces onto her face, S.S. had been locked in her bedroom for periods of time by her parents, and she had been sexually abused by an unknown person"). To the contrary, the record shows that the state first became aware of Griffis's association with S.S.'s father *after* S.S. had already been removed from the home. *Id.* (defendants observed Griffis's presence at several supervised visitations during 1995 and "*later* learned that Griffis was a child molester and that he presented a danger to S.S.") (emphasis added). Thus, exposure specifically to Griffis could not have been the danger from which S.S. was originally removed, because the defendants had no awareness of Griffis prior to 1995.

Second, the Eighth Circuit erred and diverged from the approach taken in other circuits by characterizing the state "action" at issue as the entire course of conduct over the several years that S.S. was in the defendants' custody. *See S.S.*, 225 F.3d at 963 ("two and a half years elapsed between the time that S.S. was taken from her father's custody and the time when she was returned to it, but we discern nothing in that interval that created a greater risk of abuse than the one that she would have faced had she never been taken from her father in the first place"). By characterizing the state action as the entire course of the defendants' conduct, the Eighth Circuit collapsed the intervening period of years and compared S.S. before removal to S.S. after she was returned,

ignoring the lower risk S.S. faced from Griffis while she remained in state custody.

Moreover, such a sweeping characterization of "state action" fails to distinguish cases like this one, where the state has been actively and deeply involved with the plaintiff's care over a period of years and has acquired substantial knowledge about specific dangers facing the particular plaintiff, from cases like *DeShaney* where the state intervention was minimal and extremely limited in time. *See DeShaney*, 489 U.S. at 192 (state's involvement limited to temporary custody and an investigation over the course of a few days). By failing to make this distinction, the Eighth Circuit effectively eliminated any accountability for State actions that endanger children, even where the State's files are thick with information acquired over a period of years about specific circumstances and specific dangers.

In other circuits, the state action has been defined with more precision. In *Ford*, on facts very similar to the facts of this case, the state action was defined as the decision to return the child to his father, not the entire period during which the child was in the state's custody. 899 F. Supp. at 232-33. Similarly, in *Wood* and *White*, the state action was defined as the decision to leave the passenger or the children by the side of the road, not the entire scope of the state's intervention by stopping and arresting the respective drivers in those cases. 879 F.2d at 585, 588; 592 F.2d at 383-84.

Applying a more precise definition to the state action in this case would define the action at issue as the defendants' decision to return S.S. to her father's custody. Prior to that decision, S.S. remained in foster care and faced much less threat from her father and Griffis. After the state's decision, S.S. was surely as endangered as a child left by the side of the road, and the known and foreseeable harm to her in fact

resulted. To paraphrase the *Ford* court's opinion, it is important to remember that S.S. "had not been in the custody of her father, but, rather, had been in the custody of [the state]," who affirmatively placed her in Griffis's path despite knowledge of his history as a pedophile. 899 F. Supp. at 233.

As a result of the Eighth Circuit's flawed analysis, the decision in this case diverges from those in other circuits. If the Supreme Court does not act to resolve the conflict and clarify the "state-created danger" exception, plaintiffs, and particularly children, in the Eighth Circuit will be left without a remedy afforded to plaintiffs in other circuits.

B. The State took custody of S.S. for two and one-half years, thereby triggering the custodial exception to *DeShaney*.

Under *DeShaney*'s custodial or "special relationship" exception, parties may obtain relief if they were in the State's custody at the time an injury occurred. It is irrelevant whether the state created any danger itself. The exception provides: "[w]hen the State by the affirmative exercise of its power [takes an individual into custody and] so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, e.g. food, clothing, shelter, medical care and *reasonable safety* – it transgresses the substantive limits on the state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 489 U.S. at 200 (emphasis added).

The "special relationship" exception has been used as a basis for relief under the Due Process Clause of the 14th Amendment in a number of cases where children were taken into a state's custody through a state's foster care system. For example, in *Camp v. Gregory*, 67 F.3d 1286, 1294 (CA7

1995), the court held that a child placed in the custody of the state through its child protective services agency has a due process right not to be placed with a custodian whom the state knows will fail to supervise the child adequately. In *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 852 (CA7 1990), the same court held that a child in state custody could not be transferred to a foster parent or other custodian whom the state knows or suspects to be an abuser. *See also Lintz v. Skipski*, 25 F.3d 304, 305 (CA6 1994); *Norfleet By and Through Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (CA8 1993); *Yvonne L. By and Through Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 891-93 (CA10 1992).

The basis for relief in the above cases was not that the state created the danger that the children encountered. Instead, the Courts found that the children were in the state's custody when their injuries occurred and that a "special relationship" existed between the children and the state. Therefore, the state had a duty to protect the children from the injuries they received. "The affirmative duty [of the state] to protect [arose] not from the state's knowledge of the [children's] predicament or from its expression of intent to help [them], but from the limitation which it [had] imposed on [their] freedom to act on [their] own behalf." *DeShaney*, 489 U.S. at 200.

The Eighth Circuit, in both its initial and *en banc* decisions below, as well as S.S. in her Petition, erroneously assumed that because S.S.'s injury occurred after the state had released her from its custody, that the "special relationship" exception did not apply. That was not the case. While S.S. was harmed physically by abuse after she was transferred to her father's care, she was also harmed psychologically by the transfer itself. This fact should not be ignored.

Experts have determined that "[e]xcept for a relatively small percentage of cases in which children are in danger of death or permanent physical injury, the most debilitating injuries are emotional." Judith G. McMullen, The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children, 41 Drake L. Rev. 483, 494 (1992) (citing James Garbarino and Gwen Gilliam, Understanding Abusive Families, 13 (1980)). "Thus, whereas children can generally absorb and overcome the experience of physical assault or sexual abuse if they are psychologically strengthened, they can rarely do so if they are psychologically mistreated as part of the experience." James Garbarino, et al., The Psychologically Battered Child, 9 (1986).

In this case, S.S. may claim psychological injury from the custody transfer itself, regardless of the sexual abuse she endured after the transfer occurred. The decision to transfer custody was made while S.S. remained in the state's custody, and it therefore had an affirmative duty to protect her. The state should not be allowed to discharge its duty of protection and wash its hands of any responsibility where it has knowingly decided to place the child in a hazardous situation. That duty should not be discharged simply by the state's decision to release her. *See Williams v. Wasserman*, 937 F. Supp. 524, 527 (D. Md. 1996). Accordingly, the state's transfer of S.S. to her father violated the Due Process clause of the 14th Amendment, because the transfer itself caused psychological harm to S.S. Removing S.S. from the safe environment in which she had lived for over 2 1/2 years, and exposing her to the danger known to exist in S.S.'s father's home, in and of itself caused significant psychological harm.

Several cases addressing international child custody issues under the provisions of the Hague Convention support the conclusion that returning children to an environment in

which they had been physically harmed itself causes psychological harm. For example, in *Application of Blondin v. Dubois*, 78 F.Supp.2d 283, 291 (S.D.N.Y. 2000), the court determined that removing children from a home where they were beginning to feel safe and secure and returning them to France, the country in which they had been abused, *even if they were not returned to the abuser himself*, would expose the children to "a grave risk of psychological harm." *Id.* The Court concluded that "the primary trauma is the removal and the uncertainty and the lack of security that comes from leaving where they are now and going back to the scene of the original trauma [France]." *Id.*

Likewise, in *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456, 461 (D. Md. 1999), the psychologist examining children who had been physically and emotionally abused by their father concluded that "the children's only hope of recovery from [the psychological damage] is to be placed in a secure environment. Returning the children to [the scene of the abuse], *even if it did not result in the children's physical abuse at the hand of their father*, would result in psychological trauma . . ." *Id.* (emphasis added).

Steffen F. v. Severina P., 966 F. Supp. 922, 928 (D. Az. 1997), went even further. There the court held that even in the absence of proof of sexual abuse, removal of the child from the United States to Germany after less than a year would likely cause the child severe psychological harm, because such removal would sever the psychological bond the child had developed with his American custodian. *Id.*

S.S. alleged she was abused by her father and his acquaintance during her father's visits before the custody transfer back to her father took place. *S.S.*, 186 F.3d at 1072 n.4. S.S., knowing she was being abandoned by the state's child protection services in order to be returned to the lion's

den with no one to protect her, suffered psychological trauma from the transfer itself as well as the subsequent abuse. Any child being taken from a safe place and left to the care of her known abusers necessarily suffers harm from such a transfer.

S.S.'s psychological trauma is as much an injury to S.S. as the sexual abuse itself and should provide S.S. another basis for relief under the Due Process clause of the 14th Amendment. The "special relationship" exception of *DeShaney* provides another compelling reason to grant S.S.'s Petition.

CONCLUSION

For the above-stated reasons, *Amicus Curiae* Children's Law Center of Minnesota respectfully submits that compelling reasons support granting the petition of S.S. for a writ of certiorari in this matter.

Respectfully submitted,

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